No. 93-1341 (5)

In The Supreme Court of the United States

Supreme Court, U.S.
FILED
APR 28 1994
OFFICE OF THE CLERK

OCTOBER TERM, 1993

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,

Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent,

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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QUESTIONS PRESENTED

Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §824 a-3, mandates that the Federal Energy Regulatory Commission (FERC) promulgate rules requiring electric utilities to buy power from entities described in the statute as "qualifying facilities," and those rules require that state regulatory commissions carry out the rules. Here, at the insistence of petitioners, the Pennsylvania Public Utility Commission (PUC) reviewed a contract and approved it, but due to petitioners' litigation, the original negotiated contract due dates could not be met. Thus the PUC directed entry of an identical contract with extended due dates. The questions presented are:

1. Whether the Pennsylvania Supreme Court and Pennsylvania Commonwealth Court were correct in unanimously affirming the PUC's exercise of federal statutory authority, under its mandate to implement PURPA, to preserve the contractual relationship between a qualifying small power production facility and the utility, when the relationship would otherwise have terminated due to litigation delays caused by the petitioners?

2. Given that one Petitioner (Armco/Allegheny) previously argued for an "avoided cost" calculation made on the date of contract signing, the position adopted by the Pennsylvania Commonwealth Court and affirmed in a 3-3 split decision by the Pennsylvania Supreme Court, and that the other Petitioner (West Penn) originally argued for avoided cost calculations made prior to contract signing, can the Pennsylvania Supreme Court's affirmance of the lower Court's holding possibly be erroneous as to those parties, particularly when Armco/Allegheny argued two different positions before the Pennsylvania Supreme Court?

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OPINIONS BELOW

Petitioners misstate the nature of the decision made by the Supreme Court of Pennsylvania. Contrary to their claim, the Pennsylvania Supreme Court was unanimous in its rejection of petitioners' appeals, affirming the Pennsylvania Commonwealth Court's decision *per curiam.* However, the Pennsylvania Public Utility Commission (PUC) had also appealed that part of the Commonwealth Court's decision granting the relief requested by Armco Advanced Materials, Inc. and Allegheny Ludlum Corp. (Armco/Allegheny), and the Pennsylvania Supreme Court split evenly on whether the PUC's appeal should have been granted and that portion of the lower court's decision reversed. The PUC appeal is the principal subject of the written concurring and dissenting opinion, although petitioners' arguments were also addressed, particularly in "Phase II" of the opinion.

The PUC originally reviewed the contract between West Penn Power Co. (West Penn), an electric public utility, and Milesburg Energy, Inc. (Milesburg) a small power producer, approving the contract by declaratory order. Appendix D, 48a-59a. West Penn appealed, objecting that the PUC had failed to publish notice to ratepayers as West Penn had requested, and Armco/Allegheny appealed requesting evidentiary hearings. The Commonwealth Court (the intermediate appellate court) determined that evidentiary hearings would be proper under the circumstances presented. *Barasch v. Pa. Public Utility Commission,* 119 Pa. Commonwealth Ct. 81, 546 A.2d 1296 (1988) (*Milesburg I*). *Milesburg I* is in essence a separate case although West Penn and Armco/Allegheny took that appeal.

The petitioners state that the PUC's administrative law judge (ALJ) issued a recommended decision[1] permitting

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[1]A "recommended decision", under Pennsylvania statutory law, is one that does not become a final PUC decision until it is affirmatively acted upon, i.e., it is "advisory" only, until the agency acts on the matter. 66 Pa. C.S. §§331 and 335.

West Penn to "withdraw" its petition for contract approval, but that recommendation was based on the premise that milestone date extensions would occur under *state law* (66 Pa. C.S. §508, relating generally to modifications in "public benefit" contracts). Appendix L, 215a-217a. The ALJ held, however, that Milesburg would be entitled to sell power to West Penn, at rates determined in the same time period as those in the contract, in accord with the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §824 a-3. Appendix L, 218a. Further, the ALJ in a voluminous decision addressed numerous questions, including whether any other claims of West Penn and Armco/Allegheny should be granted. The PUC's opinion and order of September 29, 1989 (Appendix N, 244a-294a), adopted the ALJ's recommendation on virtually all substantive issues, but reversed the recommendation as to Milesburg's contract due dates, directing West Penn to carry out the old contract, with new milestones and a different on-line date, based on federal statutory authority under PURPA §210, not on state law. Appendix N, 287a-288a. Finally, the PUC did not act by "divided vote"—only one Commissioner dissented.

JURISDICTION

Petitioners here fail to state a basis for jurisdiction in the Supreme Court of the United States. The right to seek certiorari in the Supreme Court is embodied in 28 U.S.C. §1257. Since statutory validity is not here at issue, petitioners must establish that a "title, right, privilege or immunity" was "specially set up or claimed" under a federal statute. Yet petitioners never have claimed a "title, right privilege or immunity", under PURPA §210, the only statute in issue, thereby failing to establish jurisdiction.

STATEMENT OF THE CASE

A. Introduction and legal background.

This case concerns the requirement that electric public

utilities make purchases from certain types of independent power producers, under PURPA §210, 16 U.S.C. §824 a-3. PURPA §210 is unusual in that it requires FERC to promulgate rules concerning sales by independent power producers, and then requires implementation of the FERC rules by state regulatory agencies. In essence, state utility regulatory agencies became the surrogate for FERC in regulating these transactions. The FERC rules (regulations) could not provide for rates in excess of the utility's incremental cost for alternative electric energy. 16 U.S.C. §824 a-3(d). At 18 C.F.R. §292.101(b)(6), FERC defined "avoided costs" as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility . . . such utility would generate itself or purchase from another source." FERC required utility payments to be at avoided cost, which is the "full avoided cost" requirement. Payments equal to avoided costs in turn are just and reasonable and in the public interest. 18 C.F.R. §292.304(a)(1), (b)(1) and (2). State regulatory commissions are required by PURPA, 16 U.S.C. §824-3(f), to implement the FERC regulations. The PUC implemented FERC's regulations by adopting its own regulations in 1982, after extensive hearings and comments. 52 Pa. Code §§57.31-57.39. These regulations elaborate on, but are consistent with, the FERC regulations.

The FERC regulation at 18 C.F.R. §292.301(b) allows a qualifying facility to agree to rates, terms or other conditions differing from those which otherwise could be required in the FERC regulations. Thus, the regulations are not mandatory, if the qualifying facility chooses to relinquish specific benefits. FERC expressly recognized this in its Preamble, 45 *Fed. Reg.* 12217 (February 25, 1980), indicating that 18 C.F.R. §§292.301-308 did not preclude agreements with different terms and that such agreements "do not violate the Commission's rules under section 210 of PURPA." Stating that contract terms differing from the regulations do not violate the regulations is vastly different than stating that such a contract is wholly outside the scope of FERC and derivative PUC jurisdiction. Clearly

FERC saw no inconsistency in joining §292.301(b) with other regulations providing benefits to qualifying facilities, and there are not two completely separate classes of contracts.

Petitioners assert that the authority exercised by the PUC, in simply allowing a qualifying facility the benefits of a contract it signed, is a federal question of compelling importance. This is not so. In sum, what the PUC did was simply to hold that passage of contract "milestones" or due dates caused by litigation delays should not cause the termination of a qualifying facility's right to sell power under terms it agreed to, when that qualifying facility had done everything it could to enter into a legally enforceable obligation, at the latest on the date of contract signing (February 25, 1987).[2] West Penn and Armco/Allegheny filed appeals repeatedly, causing the delay which prevented the qualifying facility from meeting the milestone dates. Armco/Allegheny sought to have the PUC exercise authority under PURPA to reject or modify the contract, claiming the "voluntary" terms were unlawful, until the milestone dates could not be met; then Armco/Allegheny and West Penn claimed the "voluntary" milestone dates could not be extended under the PUC's PURPA authority[3]. The PUC reasoned that since it had PURPA authority to direct a utility to enter into a contract with milestone dates, it could maintain the status quo by using the contract previously signed by West Penn, and directing insertion of new

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[2]The PUC has consistently taken the position, originally proposed by West Penn, that avoided costs calculated prior to contract signing do not violate 18 C.F.R. §292.304(d)(2). However, Commonwealth Court held that regulation means that rates must be recalculated as of the contract signing date; the Pennsylvania Supreme Court was evenly divided on whether to reverse that point; and, the PUC recognizes there is no federal question sufficient to warrant this Court granting certiorari. Thus the PUC will abide by calculations at the time of contract signing.

[3]"Voluntary" is a reference to petitioners' terminology—the PUC contends the FERC regulations do not define contracts as "voluntary" or "involuntary."

milestone dates to reflect litigation delays. This result was upheld 7-0 and 6-0 on review by the Pennsylvania appellate courts.

Contrary to the misstatement by petitioners, since the rate was the same as in the contract originally signed by West Penn, (which after exhaustive hearings was found to be below full avoided costs), the rates could not be in excess, much less "far in excess" of avoided costs. Petitioners demonstrate the absurdity of their position by admitting West Penn had agreed to the rate (Petition, p. 4), but then saying the "contract lapsed," as if that somehow made the originally reasonable rate become unreasonable.

Petitioners now apparently equate the time of Milesburg incurring a "legally enforceable obligation," under 18 C.F.R. §292.304(d)(2), to the date of the PUC order, a date unrelated to Milesburg's obligation, and a date not countenanced by Pennsylvania courts. Petitioners, having now proclaimed this to be the legally enforceable obligation date and proclaimed that to be the law, then proceed to claim that because the PUC did not accept this date, rates based on West Penn's own calculations are unjust and unreasonable, violating PURPA and resulting in "windfalls" to qualifying facilities. That is not a correct interpretation of PURPA. Petitioners themselves have advocated different possible legally enforceable obligation dates. West Penn entered the contract and first asserted that its calculation date prior to signing the contract was correct. However, when the PUC directed contract extensions, due to appellate litigation delay, West Penn then claimed the original calculation date could no longer serve as the basis for calculating payments, although West Penn did not propose an alternative date. Two references to a West Penn preference for "date of PUC order" did appear in its Pennsylvania Supreme Court briefs.

Armco/Allegheny argued for a legally enforceable obligation date as of the date of contract signing, claiming PURPA required that, in proceedings before the PUC. Before Commonwealth Court, it continued that assertion, and won. Before the Pennsylvania Supreme Court, Armco/

Allegheny was dissatisfied with its victory and argued the legally enforceable obligation date should be either the date of the PUC order or the date on which Milesburg received qualifying facility certification. Pennsylvania Supreme Court Justice Papadakos, viewing these shifting contentions and commenting on PUC concerns that avoided cost calculations tied to the "legally enforceable obligation" date could become a constantly moving target, wryly noted: "This fear seems well founded." (Appendix A, 13a-14a).

B. The Agreement and the PUC Proceedings.

Whether Milesburg can sell power to West Penn has been before the PUC and appellate courts for almost seven years, although Milesburg obligated itself to sell its power and has done what it can to achieve that result. Instead of developing a power plant (expected to be in operation long ago), at Armco/Allegheny's insistence Milesburg has had its contract with West Penn reviewed at length by the PUC, reviewed twice by the Pennsylvania Commonwealth Court and reviewed once by the Pennsylvania Supreme Court. This proceeding began on April 2, 1987 when West Penn filed a petition with the Commission seeking approval of its power purchase agreement with Milesburg and approval to collect from ratepayers the amounts West Penn would pay. West Penn calls such an agreement an Electric Energy Purchase Agreement or "EEPA."

Consistent with its practice in reviewing numerous similar utility petitions, the PUC treated the West Penn petition as a petition for a declaratory order that the utility's agreement did not violate PURPA or state law; that the payments were at or below avoided costs; and, that the payments could lawfully be recovered like other purchased power costs. Thus the PUC decided the case on the basis of the pleadings, federal and state law and the utility's filings at the PUC. A PUC order granting the West Penn petition and approving the Milesburg EEPA was entered on September 22, 1987. Appendix D. That order concluded the capacity payment by West Penn to Milesburg was below

the capacity payment West Penn could be required to pay under the PUC's regulations implementing PURPA §210, at 52 Pa. Code §§57.31-57.39.

Appeals followed and Commonwealth Court issued a decision vacating the Commission's September 22, 1987 order, holding, at Armco/Allegheny's urging, that utility customers should have notice and an opportunity to participate in some type of hearing concerning the price of capacity payments. West Penn was one of the appellants, claiming ratepayers should have notice of the contract approval process. The Commonwealth Court remanded the proceeding to the Commission with directions (1) that West Penn notify all customers about the contract filing by individual notices and (2) that the PUC hold hearings on the contract. *Barasch v. Pa. P.U.C.*, 119 Pa. Commonwealth Ct. 81, 546 A.2d 1296 (1988) *(Milesburg I)*. On August 3, 1988, since the above appeals were still pending and contract deadlines could not be met, Milesburg filed a petition for modification of the EEPA, requesting that the PUC modify the September 1, 1988 financial closing date and other related milestone dates. West Penn and Armco/ Allegheny, in response to the pending Milesburg petition, executed a "consent order" pursuant to which the financial closing date in Milesburg's EEPA was extended to February 28, 1989. On September 1, 1988, the Commission adopted the consent order that had been entered by all the parties on August 31, 1988.

On September 30, 1988, the PUC entered an order stating that West Penn should include notice of the filing of the Milesburg petition in a bill insert so it could be consolidated with proceedings on other contracts. As of September 30, 1988, a PUC petition for reargument of *Milesburg I* was still pending. The Commonwealth Court issued its order on reargument on November 3, 1988. A PUC order of January 19, 1989, addressed petitions for reconsideration that had been filed with respect to various holdings set forth in the September 30, 1988 order. On February 9, 1989, Milesburg filed a second petition to extend the financial closing date in its EEPA past February 28, 1989. By then, hearings

were scheduled before an ALJ.

Although the various petitions for extension of the milestone dates, responses thereto, and ALJ and PUC orders led to a procedural quagmire, much of that resulted from the timing of the actions and the focus on a state statute, rather than PURPA, as the ostensible basis for PUC action. Armco/ Allegheny's opposition to the Milesburg/West Penn EEPA, under any terms, was a primary reason that Milesburg was forced to seek extensions of the milestone dates in the first place. West Penn produced the extensive contract and insisted upon its terms, including the various milestone dates. It thereafter refused to extend those milestone dates voluntarily past February 28, 1989, even though West Penn was partly responsible for causing the failure to meet milestone dates, but it now insists that the contract terminated and that Milesburg has no rights whatsoever under PURPA or the FERC regulations.

The consent order specifically provided that the hearing conducted by the ALJ would consider whether there should be a further extension of the due dates in the Milesburg/ West Penn EEPA. Thus the consent order expressly recognized the likelihood of further contract extensions, resulting in the consent order being "a temporary solution to an underlying problem," as the subsequent PUC order noted. Appendix A, 117a. West Penn actively opposed any determination that the contract should be extended. Appendix K, 119a. Recognizing the procedural confusion, including the pendency of a petition for contract extension before the ALJ, the PUC by order of March 31, 1989 directed that the parties "maintain the status quo" of the EEPA until final determination of the proceedings. The order of March 31, 1989 expressly stated that Milesburg was entitled to sell its power under the PUC regulations (Appendix K, 124a) but that the time frame for calculation of the payments might be in issue. The order observed that, if Milesburg had not agreed to West Penn's rate proposal as set forth in the pending contract, Milesburg would be entitled to rates based on West Penn's costs as determined under the PUC's regulations implementing PURPA §210, which would have

been higher than those in the contract.

Hearings in the consolidated proceeding were held from April 3 through April 12, 1989. Testimony from twenty witnesses, twenty-eight statements and 162 exhibits were admitted into the record. The ALJ's recommended decision of June 8, 1989, consisted of two sections, "Phase One" and "Phase Two". Phase One of the decision held that West Penn's input assumptions into its formula for calculating the various payments for capacity under consideration were reasonable, and that the various capacity payments were at or below West Penn's costs for capacity it would build itself, determined by either West Penn's formula the PUC's regulations. Essentially, Phase One of the decision addressed the rate aspects of the consolidated proceedings and concluded that under PURPA the rates set forth in the various EEPAs, including the Milesburg EEPA, were reasonable. The ALJ found that all factors used in calculating the payments were reasonable, as was the time frame for fixing the calculations. Armco/Allegheny was the only party to file an exception on this point, again arguing that under PURPA the date of contract execution was the date of the "legally enforceable obligation," so that was the proper time-frame for fixing the utility's avoidable costs and the price it should pay.

In Phase Two, the ALJ rejected Milesburg's petition to extend the contract due dates and update its payment stream for the later on-line date, based on a particular provision of state law (66 Pa. C.S. §508).[4] While petitioners note the ALJ found Milesburg had a PURPA right to sell power under the PUC's "PURPA regulations," notwithstanding the lapse of the contract with West Penn, they fail to note he also found Milesburg would have the

[4]Section 508 provides that the PUC may revise "public interest" contracts (which typically are those involving allocation of utility line relocation costs for highway and rail crossings), so it had never been applied by the PUC to QF/utility contracts (and still has not). Since it applies to "existing" contracts, the ALJ concluded Section 508 could not authorize changes to a contract which had technically lapsed.

right as of the "time of serious negotiations," i.e., the same time as the rate calculations by West Penn used in the contract. Since all parties agreed rates under the PUC regulations would have been higher, the ALJ decision in essence was that, although Milesburg could not insist on the contract terms, it was legally entitled to rates higher than the contract allowed.

Petitioners have asserted that changes in the "renewed" contract caused a rate higher than avoided cost, which is untrue. West Penn estimates the costs it would incur to build a new plant ("avoided cost"). Specific payments to qualifying facilities are based on factors such as the on-line date of the qualifying facility. With a qualifying facility on-line date closer to the utility plant date, the qualifying facility receives more money, although the avoided cost (cost of the plant used as the calculation basis) never changes. That is precisely what happened here. In fact, West Penn originally provided rates that included both the 3.3 cents/kwh figure accepted by Milesburg, and a 3.8 cents/kwh figure for a later Milesburg in-service date.

Petitioners have referred to motions of individual PUC Commissioners, but motions, even if adopted, are not the adjudications of the PUC—that is the opinion and order, which is the correct expression of the official action taken by the agency. The order entered September 29, 1989 (Appendix N, 244a-294a) clearly indicates adoption by a three-to-one vote. Although petitioners cite the lone dissent as support for a different view of the PUC's "PURPA regulations," that Commissioner made statements that the regulations "violate PURPA" and that "avoided cost cannot be defined by regulations." Appendix, 296a. That Commissioner's views were at variance with the rest of the PUC and with most authorities. Nonetheless, the PUC regulations at 52 Pa. Code §§57.31-57.39 specifically provide a method for calculating rates a qualifying facility is entitled to as a matter of law, as the PUC order recognized. Appendix N, 283a. The order held that West Penn was obligated under PURPA §210 to purchase Milesburg's power at rates based on avoided cost projections in 1986

(the same time frame in the contract). *Id.* at 287a. Contract due dates were set as of stated periods following a final determination of the matter. *Id.* at 288a. With respect to Phase Two, the PUC directed West Penn to enter a "new" contract with Milesburg, identical to the original contract but for milestone date extensions and modifications to reflect the later in-service date of the facility. The final Commission opinion and order entered September 29, 1989, for the most part adopted Phase One of the ALJ's decision, but reversed Phase Two on the basis of PURPA authority over qualifying facilities/utility relationships.

C. The Pennsylvania Commonwealth Court Decision

Appeals by Armco/Allegheny and West Penn followed. Armco/Allegheny appealed from "Phase I" (the time period for calculation of the rates), arguing the calculation should have been made on the date of contract signing, February 25, 1987. West Penn appealed concerning "Phase Two" issues i.e., the milestone date and in-service date changes. West Penn did not appeal to Commonwealth Court concerning the Phase One issue of whether avoided cost could be calculated prior to contract signing, since West Penn itself had done just that. That issue should not properly be considered the subject of this Petition for Certiorari, since that is precisely the issue that its sole proponent, Armco/Allegheny, won in Commonwealth Court, a decision sustained by the Pennsylvania Supreme Court. In fact, on page 13 of the Petition, petitioners admit Armco/Allegheny proposed this result (the "first" issue on page 13 is the same as "issue (1)" on page 12), but they mischaracterize the holding: the Court found a qualifying facility would have a legally enforceable obligation either by tendering a contract to the utility or by doing everything within its power to create such an obligation, such as by petitioning the PUC to compel a purchase. Appendix B, at 34a.

The Commonwealth Court affirmed the PUC's direction that West Penn render an EEPA identical to the one originally presented by the utility (Phase Two) but with exten-

sions of milestone dates, finding the PUC action was an appropriate exercise of its broad authority, under PURPA, to implement PURPA §210. However, the Commonwealth Court reversed the PUC's Phase One determination, thus reversing the PUC's policy of approving cost calculations made during the period of "serious negotiations" between the utility and alternative energy supplier, instead directing the calculations be based on the date of contract execution. *Armco Advanced Materials Corp. and Allegheny Ludlum Corp. v. Pa. P.U.C.*, 135 Pa. Commonwealth Ct. 15, 579 A.2d 1337 (1990) (*Milesburg II*).

Petitioners misrepresent the Commonwealth Court holding as to the FERC regulations at 18 C.F.R. §292.301(b) and §292.401. The Court did not say the West Penn agreement had been "transformed." It did state that when a utility conditions a contract upon PUC approval "and submits the contract to the PUC to obtain such approval, the situation does not involve the private agreement contemplated by §292.301(b). The state PUC's review of such a petition appears to be proper under the §292.401 grant of authority to take 'any other action reasonably designed to implement (the FERC regulations).'" Appendix B, at 22a. In other words, the Court simply found that the PUC necessarily had jurisdiction over the contract pursuant to PURPA. Finding authority for the PUC to act concerning the contract was urged upon the Court by virtually all the parties including West Penn and Armco/ Allegheny, contrary to petitioners' assertion, and finding the PUC had that authority pursuant to PURPA, was urged by the PUC, Milesburg and even Armco/Allegheny. In context, that is the clear holding of the referenced portion of the Court's order. Appendix B, 22a, 37a-38a.

Petitioners have misstated the Commonwealth Court's holding concerning submittal of the West Penn contract to the PUC at Appendix B, 37a-38a. The Court *did not* state that the PUC must order "full avoided costs" to be paid, because West Penn sought PUC approval of its contract—that is nonsense. The Court *did* state that if a qualifying facility had simply petitioned the PUC to compel a pur-

chase, the PUC order would provide for full avoided costs and other provisions under the FERC regulations. The Court held that the West Penn submittal of the contract for PUC approval invoked "the full power and duty of the PUC to examine all of the contract's terms . . ." under PURPA and the FERC regulations. Appendix B, 37a-38a. Again, the Court was simply stating that the PUC had PURPA authority to make a contract, different from state law-derived authority, so it could exercise that PURPA authority to extend milestones.

D. The Pennsylvania Supreme Court Decision

West Penn and Armco/Allegheny appealed Commonwealth Court's "Phase Two" decision to the Pennsylvania Supreme Court, challenging the lower court's holding that the PUC had PURPA authority to direct West Penn to enter a new contract, identical to the negotiated contract but with milestone date and on-line date related changes. Armco/Allegheny also claimed the date for calculation of avoided cost should be the date of the PUC order or date of qualifying facility certification (Appendix A, 13a) or, in response to the PUC appeal, that the lower court correctly concluded the calculation date should be the date of contract signing. Appendix A, 12a. The PUC appealed from the "Phase One" part of the decision, arguing that 18 C.F.R. §292.304(d)(2) should not be read to restrict avoided cost calculation to the date of contract signing, as the lower court had held, but that prices calculated and agreed upon prior to that date (as Milesburg and West Penn did here) did not violate §292.304(d)(2), i.e., that the regulation was not exclusionary. While the written opinion describes why the PUC should have the discretion to determine the calculation date (Appendix A, 12a-16a), the Court split evenly on the question, so the "time of contract signing" remains the law in Pennsylvania. However, the Court unanimously affirmed the PUC's authority to change the milestone dates, as had the lower court.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari is bereft of anything indicating there may be "special and important reasons" for granting certiorari here. Although petitioners have attempted to show confusion among states and important questions of law where none exists, the picture they paint ultimately shows no more than their dissatisfaction with federal law, and the way it was applied in Pennsylvania. The Pennsylvania Supreme Court decision, unanimously affirming the decision of the lower appellate court (which unanimously affirmed the portion of the PUC decision at issue here), decided no "federal question" in a way conflicting with other courts. Indeed, the statute in question (PURPA §210) is inapplicable to Armco/Allegheny; it is Milesburg upon which the statute confers benefits, and it has not sought certiorari. Petitioners must establish something more than a "wrong decision," even if it were wrong, to demonstrate why certiorari should be granted. The Pennsylvania Supreme Court decided the case on facts reasonably limited to the circumstances of three qualifying facilities which entered contracts with West Penn within a short time of each other.[5]

Even had petitioners established there were a federal question presented, and established that results achieved in other states were different (they have not), there would be no conflict with PURPA or the FERC regulations. The FERC regulations are specifically intended to allow flexibility to the states in implementing the regulations, 18 C.F.R. §292.401-403, as this Court recognized in *FERC v. Mississippi,* 456 U.S. 742 (1982). The FERC regulations require that state action be consistent with PURPA and the FERC regulations but the state regulatory agency can issue regulations and take "any other action reasonably designed to implement (the FERC regulations)." 18 C.F.R. §292.401(a).

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[5]The Pennsylvania Supreme Court did not accept appeals concerning the two other projects, although the issues were identical for the most part and the cases were argued together below.

The Commonwealth Court held that the provisions of §292.304(d)(2) were "mandatory," requiring recalculation of an avoided cost payment rate on the date of contract signing, contrary to the PUC's decision to approve the earlier calculation made by West Penn, and the Pennsylvania Supreme Court split evenly on whether to reverse or affirm. The PUC did not seek certiorari, recognizing this is not an important question of federal law sufficient to warrant this Court's exercise of jurisdiction.

There is no national issue presented that requires this Court's attention. In fact, petitioners argue that Pennsylvania courts erred by finding the PUC *did* have authority under federal law, to act to insure compliance with PURPA's requirement that qualifying facilities are entitled to sell power to utilities. Armco/Allegheny and West Penn are seeking help in avoiding PURPA requirements, not compliance therewith. The PUC simply held Milesburg was entitled to the same contract it had, since it had certainly committed to a legally enforceable obligation. Allowing a contract to this small power plant is hardly a question of national importance.

Even were the unanimous decisions of the Pennsylvania appellate courts wrong, that alone would not justify certiorari. *Ross v. Moffitt,* 417 U.S. 600 (1974). Whether this Court might decide a case differently is not a sufficient reason for granting certiorari. *Watt v. Alaska,* 451 U.S. 259, 275 (1981). The petitioners present no meritorious issues to be reviewed, or even a set of consistent positions; instead, they seek to create a legal purgatory of constantly shifting dates for calculation of payments under PURPA and the lack of authority for a PUC to extend milestone dates. That would create, rather than solve, a serious federal question under PURPA.

West Penn and Armco/Allegheny ultimately want this Court to substitute its judgment on the facts for those of the Pennsylvania courts. In *Idaho Dept. of Employment v. Smith,* 434 U.S. 100, 104 (1977), Justice Stevens contended that, even where there was a clear error in the Idaho Supreme Court's decision, since there also was no question

of national importance, certiorari was unwarranted. There was no error here and no question of national importance.

While petitioners argue there are conflicts among states, they also have argued those "conflicting" decisions support the part of the Commonwealth Court decision with which the PUC disagreed. Those cases are addressed below. Contrary to petitioners' claim, the issues in this case presented for review do not involve setting rates, so if other states are "struggling" with the question of whether they can reduce rates in previously approved, ongoing contracts (in violation of PURPA), this Court's review of such decisions may be sought. Here, there were full evidentiary hearings considering the reasonableness of the rates. West Penn and Armco/Allegheny do not wish to carry out the terms of a "freely-negotiated contract;" they claim the contract is dead, along with all rights of the qualifying facility that clearly obligated itself to sell power to West Penn. Nonetheless, this is not an important question of federal law.

Petitioners launch into an irrelevant and non-record discussion of how capacity needs had changed between the contract signing, in February of 1987, and February of 1989, when West Penn refused to extend the milestone dates. The all but insignificant 43 megawatts of capacity from Milesburg will cost substantially less and be only a small portion of the 900 megawatts of the more expensive plant West Penn originally intended to build. Petition, p. 18. Of course, fuel for the lower cost units West Penn now says it would build would cost much more than coal, a far greater difference than the "capacity cost" difference they mention.

Alleging conflicts where none exist, referring to dollar amounts not in issue, stating Milesburg wanted to "be relieved" of contractual obligations when Milesburg wants the contract and petitioners do not, taking inconsistent positions and asserting only vaguely why this Court should review this case, petitioners have failed to show any reasons for granting certiorari.

I. Because the Pennsylvania courts were correct in unanimously affirming the PUC's decision concerning contract milestone dates, there is no question presented worthy of this court's exercise of jurisdiction.

Although petitioners note that §292.301(b) of the FERC regulations provides that agreements with terms differing from the regulations are permissible, they misunderstand the meaning of §292.301(b). FERC explained in its Preamble:

> Some commenters indicated that §292.301(b)(1) might be interpreted as prohibiting a State from reviewing contracts for purchases.
>
> * * * *
>
> These rules, and the exemptions being provided by these rules, are not intended to divest a State regulatory agency of its authority under State law to review contracts for purchases as part of its regulation of electric utilities. Such authority may continue to be exercised if consistent with the terms, policies and practices under Commission's implementing regulations. If the authority or its exercise is in conflict with these sections of PURPA or the Commission's regulations thereunder, the State must yield to the Federal requirements. The Commission does not believe it possible or advisable to attempt to establish more precise guidelines than these.

Preamble, 45 *Fed. Reg.* 12,233 (February 25, 1980).

Neither the Pennsylvania courts nor the PUC have suggested the PUC should or could exercise unfettered discretion under PURPA to modify contracts submitted to it. What the PUC does say, and Pennsylvania courts have unanimously adopted as a proper exercise of its mandate and authority under PURPA in this case, is that the PUC may act, judiciously and sparingly, to approve contract modifications, particularly those preserving the status quo, to the extent they are consistent and in accord with what the PUC could have directed the parties (QF and util-

ity) to do in the first place, as defined in PURPA and specifically in the FERC regulations. The PUC could not modify a contract to be contrary to the requirements of those regulations. Indeed, since the PUC's authority emanates from PURPA and the FERC regulations, the PUC could not act inconsistently with those regulations. Thus while the PUC cannot act to require a qualifying facility to waive an entitlement provided by federal law, it may approve a contract where a qualifying facility waives rights (18 C.F.R. §292.301) or it may determine qualifying facilities have specific PURPA rights.

In this case there is no holding that the PUC has substantial authority to modify contracts, thus there is certainly *no conflict* with determinations of other highest state courts as to the extent of such authority. Neither the PUC nor Milesburg has argued for extension of such authority to questionable or controversial lengths—the exercise here was the simple and mundane act of maintaining the status quo by replacing an unworkable set of "milestone dates," the application of which would have *terminated* the Milesburg/West Penn agreement the PUC found to be consistent with and thus required by PURPA, with milestone dates tied to the conclusion of the appealed proceedings. The utility's insistence on a) notice to all customers and b) full approval of complete cost recovery, by the PUC, coupled with c) insistence on milestone dates not extendable even by force majeure, and which were not capable of being met in the event of litigation, made this PUC action necessary to satisfy PURPA's mandate to encourage qualifying facilities, since Milesburg fully complied with PURPA and did everything in its power to meet its obligations. Otherwise, the utility action would have thwarted PURPA and the FERC regulations, and in the face of actual litigation, could not be permitted to cause the failure of an agreement clearly consistent with, and otherwise required by, PURPA.

The scope of PUC authority under PURPA can be measured by considering what the PUC is empowered to do. If Milesburg had filed a petition with the PUC seeking a con-

tract and offered a contract signed by it on February 25, 1987, the PUC could have found that was the date on which Milesburg had committed to a "legally enforceable obligation" pursuant to §292.304(d)(2). The PUC could approve a contract with the terms prescribed by West Penn, and could find, that the rates to be paid under the West Penn formula, which changed according to QF on-line date, were at or below full avoided costs. Finally, the PUC could approve contract provisions setting out milestone dates tied to the date of a final order, i.e., dates contingent upon termination of the proceeding. Yet, all these things are exactly what happened, except that West Penn insisted on firm, non-mitigateable milestone dates. Since the PUC could unquestionably have approved all these things, at least with Milesburg's consent, and directed that they be done pursuant to PURPA, the PUC could act to make the proposed agreement consistent therewith, which is what happened—there was no aberrant exercise of PUC authority; no act inconsistent with PURPA; no approval by Pennsylvania courts of acts exceeding PURPA; and, no conflict with a decision of any other state court.

The mandate to implement FERC regulations requires something beyond simple enforcement of those regulations. It means that PURPA authorizes the PUC to exercise jurisdiction over qualifying facility/utility relationships to insure compliance with PURPA, i.e., to insure utilities bargain fairly with QF's, and that the PUC should not endorse agreements whose provisions are contrary to public policy set forth in PURPA. Since the PUC can direct the entry of contracts, it is absurd to say it cannot direct changes to contacts presented to it when necessary to carry out the purpose of PURPA—such a view *would* discourage QF's from entering voluntary agreements.

Nothing indicates there is a federal policy "favoring free negotiation of long term contracts"—utilities did not sign such contracts prior to PURPA—so the PUC and Pennsylvania Courts could not have eviscerated a non-existent "policy". It is indeed a strange view to suggest Milesburg "walked away" from its contract, when West Penn is the

party which refused to extend the milestones so the contract could proceed. Further, the PUC has wholeheartedly endorsed milestone dates, but recognized in the unexpected circumstances of this case, failure to extend such dates would be completely inequitable.

Petitioners have cited cases from other states as ostensibly conflicting with the decision here. This is not so. Petitioners first cite *Public Utility Commission of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201 (Tex. 1991) (*Gulf States*). In that case, the utility entered a contract with payments in excess of the utility's avoided cost. The utility submitted its contract to the Texas Commission for approval. The commission stated the utility could not recover any payments above avoided cost. The Texas commission had promulgated its own "PURPA regulations" but one Texas regulation stated rates could not exceed avoided costs, while another regulation allowed deviation in rates and other terms. The Texas commission attempted to "reconcile" these regulations by prohibiting the utility from recovering payments in excess of avoided cost, which the Court held was error. The way to reconcile the two regulations was to find the avoided cost "ceiling" only applied when the commission *ordered* a utility and qualifying facility to enter into a contract; when, on the other hand, the utility and qualifying facility *voluntarily* agreed on the rate provisions, the commission had to respect the regulation allowing voluntary deviance from the rates under the regulations. The Court found nothing in the FERC regulations compelled a different result. However, the Court stated the commission retained its authority to determine whether payments above full avoided cost would ultimately be recoverable, but the commission could not *automatically* disallow recovery—the utility would have the opportunity to establish that such payments were just and reasonable. Applying *Gulf States* to this case would have meant Armco/Allegheny could not litigate the rate level in the first place, since that holding prohibited inquiring into the rate provisions of voluntary contracts.

This decision is not inconsistent with the decision here.

None of the parties to the Texas contract requested modification by the Texas commission. What the Texas Supreme Court found improper was the commission's application of one regulation to invalidate the contract, when so doing would be in conflict with both another Texas regulation and the FERC regulations. In the instant case, Milesburg, one of the parties to the contract, did request that the PUC extend the milestone dates. Also, the extension of the milestone dates (by directing entry of a "new" contract with later milestone dates) was in no way in conflict with either state or FERC regulations.

In fact, petitioners' argument that §292.301 precludes extending milestones is disingenuous since Armco/Allegheny itself previously argued that the PUC should reduce the *negotiated rate* set out in the original EEPA. Before the ALJ, Armco/Allegheny argued that the PUC should have reduced rates so that the purchase from qualifying facilities would be *less* than avoided cost. Implicit in Armco/Allegheny's request was a presumption that the PUC has authority to change the payment provisions of a contract voluntarily entered into. Of course the contention that payments by the utility should be reduced conflicts with the *Gulf States* holding.

Petitioners next cite the case of *In Re Vicon Recovery Systems*, 572 A.2d 1355 (Vt. 1990) *(Vicon)*. The arguments in that case are more than a little confusing, but it appears the state commission rejected a contract calling for payments at rates above avoided cost when the contract was submitted for approval. The qualifying facility appears to have argued that the contract was allowable under PURPA and the FERC regulations, which in turn "preempted" state statutory authority. The qualifying facility claimed the utility commission could only exercise PURPA authority, and since the FERC regulations allowed voluntary price agreements under 18 C.F.R. §292.301, the Commission could not disapprove the contract on the basis that payments exceeded avoided costs. The Vermont Supreme Court disagreed, finding there was no preemption of state authority by PURPA under those circumstances and that

18 C.F.R. §292.301, while permitting parties to agree on terms in excess of avoided cost, did not deprive the commission of PURPA authority to approve or disapprove such contracts. Thus *Vicon* stands for a result opposite to that suggested by petitioners—there, the commission disapproved a voluntary contract.

The third case cited by petitioners, *Water Power Co., Inc. v. Pacificorp*, 99 Or. App. 125, 781 P.2d 860 (1989), *review* denied, 309 Or. 291, 787 P.2d 887 (1990), *cert. denied*, 498 U.S. 811 (1990) *(Water Power)*, is also not in conflict with the decision here. There the qualifying facility wished to sell power to a utility where the power would have to be transmitted through other utilities. The purchasing utility required a transmission agreement. Negotiations began in 1982 but the utility's avoided cost rate schedule changed to lower rates in 1983. Since it had not obtained an agreement satisfactory to the purchasing utility, in October of 1983, the qualifying facility asked the PUC to decide whether it was entitled to the higher 1982 rates. The Oregon Commission decided that the utility *must* sign such an agreement but could demand a written plan to transmit the power.

The parties were still haggling by the end of 1984. The commission decided the purchasing utility was entitled to control the point of delivery, but gave the qualifying facility an *extension of time*, until November 1, 1985, to obtain the agreement. The parties signed a power sales agreement, but the qualifying facility did not get a transmission agreement.

In a breach of contract action, the qualifying facility contended the utility had an absolute obligation to buy its power under PURPA and Oregon legislation and regulations, so the utility could not enforce the contract provision requiring a transmission agreement, even though the qualifying facility had agreed to the provision. The Oregon court concluded the qualifying facility was not excused from that provision. This was a completed contract to which the state regulatory commission had given final approval (not one being litigated before the it) *and* the com-

mission had given the qualifying facility a time extension.

The specific effect of the holding in *Water Power* is that the qualifying facility was not entitled to damages for breach of contract, since the utility did not breach the contract by insisting on a transmission agreement. The Court declined to find there was anything in PURPA or state law that would have limited the authority of the utility and qualifying facility to agree on such a provision.

The next case cited is *Bates Fabrics, Inc. v. Public Utilities Commission*, 447 A.2d 1211 (Me. 1982) *(Bates)*. In that case, the qualifying facility and the utility reached a contract for the sale of the QF's electricity about two years before passage of PURPA. Subsequent to promulgation of the FERC regulations and a Maine statute parallelling the FERC regulations, the qualifying facility sought to have the state regulatory commission revise the contract so the utility would pay avoided cost rather than the lower contract price. The Maine commission declined to modify the contract noting that under the Maine statute the parties had mutually agreed on a price for the sale of electricity, thus the commission had no authority to change that price. The Supreme Court of Maine agreed and noted that the FERC regulations and the comments by FERC indicated there was no intention that contracts prior to PURPA were to be changed pursuant to PURPA or the FERC regulations. The question in the instant case was not whether to modify a provision in an ongoing pre-PURPA contract to confer an additional benefit on one of the parties, as in *Bates*, but rather whether the PUC could exercise its authority under PURPA to direct West Penn to extend the milestone dates so this project could potentially survive.

None of these decisions is inconsistent with the Court's decision that the contract milestones should be extended in the Milesburg/West Penn contract. In *Gulf States*, none of the contracting parties sought modification of the terms and the commission arbitrarily sought to limit cost recovery by applying one of its regulations in a manner inconsistent with another regulation allowing the parties to fully negotiate provisions in the contract. In *Bates*, there

was a pre-PURPA contract which was voluntarily agreed upon and which had been in effect for years. The Court found no reason under PURPA or state statute to disturb the provisions of that contract. In *Water Power,* the commission had acted to direct the parties to extend certain completion dates previously and had clearly stated the utility was entitled to approve the point of interconnection. The Court found it was entirely consistent with PURPA to allow the parties to voluntarily make such a bargain and there could be no breach of contract from the utility insisting upon compliance with that term. The Vermont Court approved rejection of a voluntary contract, while the Texas Court reversed rejection of such a contract. However, both cases involved rates that were above avoided costs, while this case does not involve rates. In fact, Pennsylvania had full evidentiary hearing on rates and many other contract circumstances, a process which did not occur in any of the other states. Finally, the cases were based on PURPA implementation in individual states, and the FERC regulations permit flexibility to the states in deciding how and when avoided costs should be calculated, so differences among states in that regard do not present a "conflict" to be resolved by this Court.

Astonishingly, Armco/Allegheny, the very party that insisted upon PUC review of the contract in question, that demanded the PUC find the contract price excessive under PURPA, that argued for the application of the FERC rules (18 C.F.R. §292.304(d)(2)) to require recalculation of the contract price on the contract signing date, that argued PURPA constraints three times before Pennsylvania appellate courts, knowing all the time the contract was negotiated, rather than mandated by the PUC, now asks this Court to invalidate the contract on the basis that it was "voluntary" under 18 C.F.R. §292.301, and thus entirely beyond the power of the PUC, under PURPA, to extend milestone dates. If accepted, this argument can only mean the PUC should never have reviewed the contract in the first place, and that Armco/Allegheny several times misrepresented that PURPA applied to this case.

West Penn contends the PUC lacked PURPA authority to review the submitted contract and (finding litigation delays caused passage of milestone dates) to direct West Penn to enter a contract with extended milestones. Yet West Penn agrees the PUC has authority to approve pass-through of the contract rates, and to approve the contract as complying with PURPA. West Penn also asked the PUC to direct publication of the order in the Pennsylvania Bulletin. Finally, the contract stated it would not become effective until there existed a final, non-appealable PUC order giving all requested approvals. Since publication of the order could lead to someone attacking the contract, West Penn itself considered the PUC to have authority to review the contract for consistency with PURPA.

We submit that extension of the milestones was appropriate and the "new" contract appropriately used all the terms, including price, on which West Penn and Milesburg had previously agreed, and the price should not be recalculated as of the date of the PUC's order. If the contract was outside of PURPA, then certainly West Penn would have asked the PUC to find that to be the case in a declaratory order, which it did not do. Many QF/utility contracts are negotiated, at least partially, even under bidding programs. If West Penn's argument, that all such contracts are outside of the FERC regulations, were correct, then state courts could not interpret those regulations as requiring or allowing examination of rates or any other terms of negotiated contracts. This means FERC developed a regulatory plan that would not apply in most situations, and PUC contract review would be unnecessary. Clearly, not even petitioners take this view seriously. Petitioners are really saying a utility can take a QF entirely outside the FERC regulations, by signing a contract, and then the utility can deprive that QF of PURPA benefits it would have had, had it not signed the contract. This is certainly not the intent of PURPA or the FERC regulations. There is no conflict with other states nor were the PUC or Pennsylvania courts in error in interpreting PURPA.

II. The PUC held full evidentiary hearings, determining that rates under the contract were below full avoided costs and just and reasonable. The Pennsylvania courts correctly determined nothing in PURPA or the FERC regulations required recalculation of contract rates on the date of the PUC order.

Petitioners have taken shifting views of the date on which calculations of avoided costs should be made throughout this proceeding. However, they attempt to create an impression that the unanimous Pennsylvania courts, and the PUC, approved rates above avoided costs and "violated PURPA," since those authorities gave no credence to the preposterous idea that the date of the PUC order, at the end of evidentiary hearings, was the date on which calculations of avoided costs should be made. Petitioners' current theory seems to be that, although they caused and participated in extensive proceedings before the PUC, nonetheless Milesburg had to wait until the very end of those proceedings before it could be "committed" to a legally enforceable obligation to sell power. The theory is nonsensical. First, Milesburg executed a contract on February 25, 1987, so it clearly "committed" to sell power, at the latest, by that date. Second, there were full evidentiary hearings concerning West Penn's need for capacity, avoided cost pricing and other factors, all premised on Milesburg having committed to sell power. The conclusion was that the price was below full avoided costs, so the decision cannot conflict with decisions from other states finding payments were in *excess* of avoided costs, particularly when there were not evidentiary hearings in those cases, including *Petition of East Georgia Cogeneration,* 158 Vt. 525, 614 A.2d 799 (1992). Also, in the face of these exhaustive hearings, the petitioners' claim that the PUC gave "no weight" to whether the rates were "just and reasonable" is a blatant misstatement.

The timeframe for deciding when a legally enforceable obligation occurs may differ from state to state without violating PURPA. By any standards, however, Milesburg had done everything it could do to create a legally enforceable

obligation by February 25, 1987, when it signed the contract. Petitioners attempt to mislead this Court into thinking a substantial sum of money is involved by claiming it had no need for capacity on the date of the PUC's order on September 29, 1989. There is certainly no fact of record indicating that West Penn had no future need for 43 MW of capacity on that date, particularly when it had originally planned to build 900 MW of utility-owned, more expensive plant. Petition, p. 18.

The party (Armco/Allegheny) which originally won its contention that rates should be calculated as of contract signing (February 25, 1987) should not now be heard to complain the date should be September 29, 1989, so it can drag the proceedings out longer. Petitioners indicate their true objective, in claiming that "in a falling avoided-cost market, customers can be prejudiced by an interpretation of the FERC rule favoring developers" and contending the FERC rules are "ambiguous." Petition, p. 29. So while they have argued that the unanimous Pennsylvania decisions were wrong, they really wish to attack the FERC rules. Thus they would have this Court accept this case involving an insubstantial 43 MW capacity plant, reversing a holding one of them argued for, to decide policy questions so that states do not interpret the FERC rules in favor of developers, and to insure this contract does not go forward. This Court has already upheld the FERC regulations, in *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983); it need not reaffirm that decision nor do petitioners need "guidance" on whether the date on which Milesburg signed the contract is the date for payment calculation.

CONCLUSION

There is no federal question of any importance, thus the petition for writ of certiorari should be denied.

Respectfully submitted,

Lee E. Morrison

APPENDIX

PREAMBLE TO F.E.R.C. REGULATIONS AT 18 C.F.R. 292.101 *ET SEQ*

Published in 45 *Fed. Reg.* 12214-12233
February 25, 1980

Subpart C—Arrangements Between Electric Utilities and Qualifying Cogeneration and Small Power Production Facilities Under Section 210 of the Public Utility Regulatory Policies Act of 1978

§292.301 Scope

Section 292.301(a) describes the scope of Subpart C of Part 292 of the Commission's rules. Subpart C applies to sales and purchases of electric energy or capacity between qualifying cogeneration or small power production facilities and electric utilities, and actions related to such sales and purchases. Section 292.301(b)(1) provides that this subpart does not preclude negotiated agreements between qualifying cogenerators or small power producers and electric utilities which differ from rates, or terms or conditions which would otherwise be required under the subpart. Paragraph (b)(2) states that this subpart does not affect the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

Paragraph (b)(1) reflects the Commission's view that the rate provisions of section 210 of PURPA apply only if a qualifying cogenerator or small power production facility chooses to avail itself of that section. Agreements between an electric utility and a qualifying cogenerator or small power producer for purchases at rates different than rates required by these rules, or under terms or conditions different from those set forth in these rules, do not violate the Commission's rules under section 210 of PURPA. The Commission recognizes that the ability of a qualifying co-

generator or small power producer to negotiate with an electric utility is buttressed by the existence of the rights and protections of these rules.

Some comments stated that paragraph (b)(2) would unfairly penalize cogenerators and small power producers who, prior to the promulgation of these regulations, entered into binding contracts with electric utilities under less favorable terms than might be obtainable under these rules. The Commission interprets is mandate under section 210(a) to prescribed "such rules as it determines necessary to encourage cogeneration and small power production . . . "to mean that the total costs to the utility and the rates to its other customers should not be greater than they would have been had the utility not made the purchase from the qualifying facility or qualifying facilities. That a cogeneration or small power production facility entered into a binding contractual arrangement with an electric utility indicates that it is likely the sufficient incentive existed, and that the further encouragement provided by these rules was not necessary. As a result, the Commission has not revised this provision.

* * *

§292.602 Exemption of qualifying facilities from the Public Utility Holding Company Act and certain State law and regulation.

Under section 210(e) or PURPA the Commission can exempt qualifying facilities from regulation under the Public Utility Holding Company Act of 1935 and State laws and regulations concerning rates or financial organization. Only cogeneration facilities and small power production facilities of 30 megawatts or less may be exempted from both of these laws, with the exception that any qualifying small power production facility (i.e., up to 80 megawatts) using biomass as a primary energy source can be exempted from these laws.

* * *

Some commenters indicated that §292.301(b)(1) might be interpreted as prohibiting a State from reviewing con-

tracts for purchases. These commenters stated that, as a part of a State's regulation of electric utilities, a State regulatory authority needs to be able to review contacts entered into by electric utilities it regulates.

These rules, and the exemptions being provided by these rules, are not intended to divest a State regulatory agency of its authority under State law to review contracts for purchases as part of its regulation of electric utilities. Such authority may continue to be exercised if consistent with the terms, policies and practices under sections 210 and 201 or PURPA and this Commission's implementing regulations. If the authority or its exercise is in conflict with these sections of PURPA or the Commission's regulations thereunder, the State must yield to the Federal requirements. The Commission does not believe it possible or advisable to attempt to establish more precise guidelines than these. Accordingly, State which have questions in this regard should seek an interpretive ruling from the Commission's General Counsel.

Subparagraph (c)(3) provides that, upon request of a State regulatory authority or nonregulated electric utility, the Commission may limit the applicability of the broad exemption from the State laws. This provision is intended to add flexibility to the exemption.

The Commission perceives that there may be instances in which a qualifying facility would wish to have an interpretation of whether or not it is subject to a particular State law in order to remove any uncertainty. Under subparagraph (c)(4), the Commission may determine whether a qualifying facility is exempt from a particular State law or regulation. (Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §2601, *et. seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. §791, *et seq.*, Department of Energy Organization Act, 42 U.S.C. §7101, *et seq.*, E.O. 12009, 42 *Fed. Reg.* 46267).